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**The Strand Theatre of Shreveport Corporation and Stage Employees Local 298 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Technicians, Artists, and Allied Crafts of the United States and Canada, AFL–CIO.** Case 15–CA–17548

February 27, 2006

**DECISION AND ORDER**

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND SCHAUMBER

On August 3, 2005, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and Charging Party each filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board had delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup>

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<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In its exceptions, the Respondent contends that it never entered into any collective-bargaining agreements with the Union, and states that the judge erroneously stated, in fn. 3 of his decision, that the Respondent admitted in its answer to the complaint that there have been "collective bargaining agreements" between the Respondent and the Union. We note that, in its April 14, 2005 amended answer, the Respondent admitted only that there were "agreements" between the Respondent and the Union. However, we find that the record clearly establishes that the Respondent and Union were parties to a series of collective-bargaining agreements governed by Sec. 9(a) of the Act. As a result, we need not rely on the judge's finding that the relationship between the Respondent and the Union "matured into a Section 9(a) relationship . . . ."

We likewise correct the judge's statement, in the analysis section of his decision, that the Respondent raised its 10(b) affirmative defense only at the hearing, but not in its answer to the complaint. The Respondent did, in fact, raise its 10(b) defense in its April 21, 2005 second amended answer as well as at the hearing. We agree, however, with the judge's rejection of the Respondent 10(b) affirmative defense on the merits.

As stated below in fn. 2, Member Schaumber finds it unnecessary to pass on the judge's finding that the termination of employee Steve Palmer violated Sec. 8(a)(3). Therefore, Member Schaumber also finds it unnecessary to pass on the judge's rejection of the Respondent's 10(b) defense to that allegation.

and to adopt the recommended Order as modified and set forth in full below.<sup>3</sup>

**ORDER**

The National Labor Relations Board orders that the Respondent, The Strand Theatre of Shreveport Corporation, Shreveport, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with the Union, Stage Employees Local 298 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Technicians, Artists, and Allied Crafts of the United States and Canada, AFL–CIO, as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All employees performing work described in Paragraph 2.1 of the collective bargaining agreement between the Respondent and the Union, effective from December 15, 1999 to December 14, 2002, and by mutual consent, extended to August 15, 2004.

(b) Unilaterally ceasing the application of the terms and conditions set out in the 1999–2004 (as extended) collective-bargaining agreement to unit employees.

(c) Eliminating the position of Regular Employee without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct and the effects of this conduct.

(d) Failing and refusing to use the Union's hiring hall in hiring its employees without prior notice to the Union or an opportunity to bargain with respect to this conduct and the effects of this conduct.

(e) Insisting that it would not reach agreement with the Union on a collective-bargaining agreement and insisting on changing the scope of the unit.

(f) Refusing to hire employees affiliated with the Union's hiring hall.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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<sup>2</sup> In agreeing with the judge that the Respondent violated Sec. 8(a)(3) by refusing to hire employees affiliated with the Union's hiring hall, we rely solely on the fact that the Respondent failed to except to this finding.

We agree with the judge that the Respondent violated Sec. 8(a)(5) of the Act by unilaterally eliminating employee Steve Palmer's "Regular Employee" position. In view of this 8(a)(5) finding, we find it unnecessary to pass on the judge's additional finding that Palmer's termination violated Sec. 8(a)(3), because that additional finding would not materially affect the reinstatement and make-whole remedy for Palmer.

Member Liebman finds, in agreement with the judge, that Palmer's termination violated Sec. 8(a)(3) as alleged.

<sup>3</sup> We shall modify the judges' recommended Order to include remedial language for the violations found.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore the terms and conditions of employment which were in effect and applicable to employees in the bargaining unit before the Respondent unilaterally changed the terms and conditions of employment on August 15, 2004, including the use of the Union's hiring hall, and make whole all unit employees for losses suffered as a result of these changes in the manner set forth in the remedy section of the judge's decision.

(b) Restore the position of the Regular Employee and, within 14 days from the date of this Order, offer Stephen Palmer full reinstatement to that position.

(c) Make Stephen Palmer whole for any loss of earnings and other benefits suffered as a result of the Respondent's elimination of the Regular Employee position, in the manner set forth in *Ogle Protection Services*, 183 NLRB 682 (1970), *enfd.* 444 F. 2d 502 (6th Cir. 1971), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) Recognize and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of unit employees with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Shreveport, Louisiana facility copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Re-

spondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 15, 2004.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 27, 2006

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD  
 APPENDIX  
 NOTICE TO EMPLOYEES  
 POSTED BY ORDER OF THE  
 NATIONAL LABOR RELATIONS BOARD  
 An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain with the Union, Stage Employees Local 298 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Technicians, Artists, and Allied Crafts of the United States and Canada, AFL-CIO, as the exclusive representative of our employees in the following unit:

All employees performing work described in Paragraph 2.1 of the collective-bargaining agreement between the Respondent and the Union, effective from December

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

15, 1999, to December 14, 2002, and by mutual consent, extended to August 15, 2004.

WE WILL NOT unilaterally cease the application of the terms and conditions set out in the 1999–2004 (as extended) collective-bargaining agreement to our unit employees.

WE WILL NOT eliminate the position of Regular Employee without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct and the effects of this conduct.

WE WILL NOT fail and refuse to use the Union's hiring hall in hiring our employees without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct and the effects of this conduct.

WE WILL NOT insist that we will not reach agreement on a collective-bargaining agreement.

WE WILL NOT insist on changing the scope of the unit.

WE WILL NOT refuse to hire employees affiliated with the Union's hiring hall.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce you in the rights set forth above.

WE WILL restore the terms and conditions of employment which were in effect and applicable to employees in the bargaining unit before we unilaterally changed the terms and conditions of employment on August 15, 2004, including the use of the Union's hiring hall, and WE WILL make whole, with interest, all unit employees for losses suffered as a result of these changes.

WE WILL within 14 days from the date of this Order, restore the position of the Regular Employee and offer Stephen Palmer full reinstatement to that position.

WE WILL make Stephen Palmer whole, with interest, for any loss of earnings and other benefits suffered as a result of the elimination of the Regular Employee position.

WE WILL recognize and on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of unit employees with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

THE STRAND THEATRE OF SHREVEPORT CORPORATION

*Charles R. Rogers, Esq.* for the General Counsel.  
*Price Barker, Esq.* and *Charles W. Penrod, Esq.* (*Cook, Yancey, King, & Galloway*), of Shreveport, Louisiana, for the Respondent.

*Nicole Cuda Perez, Esq.* (*Spivak, Lipton, Watanabe, Spivak, Moss & Orfan LLP*), of New York, New York, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. A charge was filed on November 18, 2004, by the Stage Employees Local 298 of the International Alliance of Theatrical Stage Employees (I.A.T.S.E.) and Moving Picture Machine Technicians, Artists, and Allied Crafts of the United States and Canada, AFL–CIO (Union or Local 298) against the Strand Theatre of Shreveport Corporation.<sup>1</sup> The charge was amended on February 25, 2005.<sup>2</sup> On February 28, 2005, a complaint was issued which alleges that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, (the Act), by about July 22, 2004, terminating its employee Stephen Palmer by eliminating the position of Regular Employee, and by since on or about August 15, 2004, failing and refusing to hire employees affiliated with the Union's hiring hall, both of which actions were taken because the individuals involved were affiliated with the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. The complaint also al-

<sup>1</sup> The charge, General Counsel's Exhibit 1(a), alleges that Respondent violated Sec. 8(a) (1), (3), and (5) of the National Labor Relations Act by the following conduct:

During the past 6 months the Employer has refused to bargain in good faith with Stage Employees Local 298, the bargaining representative of its stage employees, has unilaterally modified that terms and conditions of employment without bargaining to impasse and has unlawfully terminated the contractual crew referral arrangement and refused to hire Local 298 members in order to discriminate against employees because of their union affiliation.

<sup>2</sup> As here pertinent, the amended charge, GC Exh. 1(d), alleges violations of Sec. 8(a)(1),(3), and (5) and reads as follows:

On about August 15, 2004, the above-named Employer, by its agents, officers, and representatives, terminated the employment of Stephen Palmer because of his membership and activities on behalf of the Stage Employees Local No. 298 I.A.T.S.E. and ceased using the hiring hall of Stage Employees No. 298, I.A.T.S.E. because the people it referred were members of and active in Stage Employees Local No. 298, I.A.T.S.E.

Since about September 22, 2004, the above-named Employer, by its agents, officers, and representatives refused to bargain collectively with the Stage Employees Local No. 298, I.A.T.S.E. by bargaining in bad faith by insisting that it will not reach an agreement on a collective-bargaining agreement.

Since about September 22, 2004, the above-named Employer, by its agents, officers, and representatives refused to bargain collectively with the Stage Employees Local No. 298, I.A.T.S.E. by bargaining in bad faith by insisting on changing the scope of the bargaining unit.

Since about August 15, 2004, the above-named Employer, by its agents, officers, and representatives refused to bargain collectively with the Stage Employees Local No. 298, I.A.T.S.E. by ceasing to use the hiring hall of Stage Employees Local No. 298, I.A.T.S.E.

Since about August 15, 2004, the above-named Employer, by its agents, officers, and representatives refused to bargain collectively with the Stage Employees Local No. 298, I.A.T.S.E. by unilaterally eliminating the position of Regular Employee, as defined in the collective-bargaining agreement, without giving notice to the Stage Employee Local No. 298, I.A.T.S.E.

leges that Respondent violated Section 8(a)(1) and (5) of the Act by (a) on August 15, 2004, eliminating the position of Regular Employee, and by failing and refusing since August 15, 2004, to use the Union's hiring hall in hiring its employees, both of which subjects relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purpose of collective bargaining, and both of which actions were taken without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct, and (b) since about September 22, 2004, insisting that it will not reach an agreement on a collective-bargaining agreement, insisting on changing the scope of the Unit, and with other conduct has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit.<sup>3</sup> Respondent denies violating the Act as alleged.

A trial was held in this matter on April 25 and 26, 2005, in Shreveport, Louisiana. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by General Counsel, the Charging Party, and Respondent<sup>4</sup>, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent, a corporation with an office and place of business in Shreveport, Louisiana, has been engaged in the production and staging of theatrical plays. In conducting its operations, annually Respondent derived gross revenues in excess of \$1 million and it purchased goods and services valued in excess of \$50,000 which were furnished to Respondent at its Shreveport, Louisiana facility directly from points outside the State of Louisiana. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

##### II ALLEGED UNFAIR LABOR PRACTICES

At the outset of the trial, Respondent and counsel for General Counsel stipulated to the authenticity and admissibility of Re-

<sup>3</sup> The complaint alleges that the following employees of Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Sec. 9(b) of the Act:

All employees performing work described in Paragraph 2.1 of the collective-bargaining agreement between Respondent and the Union, effective from December 15, 1999 to December 14, 2002, and by mutual consent, extended to August 15, 2004.

Respondent denies this allegation of the complaint. The Respondent also denied the next allegation of the complaint, namely, as here pertinent, that its recognition of the Union had been embodied in successive collective-bargaining agreements, with the following language: "Denied except to admit there have been collective bargaining agreements which are the best evidence of their terms and condition." (Emphasis added.)

<sup>4</sup> Respondent and counsel for General Counsel have filed motions to file reply briefs. The Board's Rules do not provide for the filing of a reply brief at this stage of the proceeding. Accordingly, the motions are denied.

spondent's Exhibits 1 through 12, 15 through 27, 31, and 32. The parties also agreed to the following stipulations:

Agreements were signed by The Strand and Local on August 5, 1996 for the time period August 1, 1996 to July 31, 1999, another agreement signed on August 4, 1996, for the time period August 1, 1996 to July 31, 1999, and another agreement was signed on May 10, 2000 for the time period December 15, 1999 to December 14, 2002.

The agreement signed on May 10, 2000 was extended by mutual agreement to continue until June 30, 2003. The May 10, 2000 agreement was again extended by mutual agreement to August 15, 2004. Since the 2000 agreement and its extensions expired on August 15, 2004, The Strand has not used Local employees from the hiring hall. Since August 15, 2004, The Strand has used Athalon for stage labor. Steve Palmer was the regular employee under the 2000 agreement and its extensions, which expired on August 15, 2004.

The Strand and the Local met on July 22, August 13, August 18, September 1, September 22, and October 11, 2004. On August 18, 2004, the Local agreed to eliminate the regular employee.

....

All the negotiation sessions occurred at the office of Ron Weems ..., who was the president of the board of directors for Strand. Present at all of the negotiation sessions for the Respondent were Ron Weems, Danny Fogger, the general manager of Strand, and Penne Mobley, the executive director of Strand.

....

Present for the union at the session of July 21, 2004 [Sic. As noted above, the first session was held on July 22, 2004.] were Steve Palmer, union president, and Bill Gaston, union business agent. Present at all of the other sessions for the union were Steve Palmer, Bill Gaston, Don Gandolini, the union's international rep., and Jimmy Burnett, the local union's attorney. [Tr. pp. 7—9 and Jt. Exh. 1]

Additionally, Respondent stipulated to the authenticity and admissibility of General Counsel's Exhibit 14. This compilation of documents, according to counsel for General Counsel, shows The Strand's use of employees from the Athalon Group, LLC since July 30, 2004.<sup>5</sup> And finally, counsel for General Counsel and the Respondent stipulated to the authenticity and admissibility of (1) an agreement between Strand Partners and Stage Employees Local 298 effective August 1, 1996 through July 31, 1999, General Counsel's Exhibit 16,<sup>6</sup> (2) an agreement between The Strand Theatre and Stage Employees Local 298 effective August 1, 1993 through July 31, 1996, General Coun-

<sup>5</sup> Respondent indicated that it was not stipulating to what counsel for General Counsel represented that the documents show.

<sup>6</sup> The following appears on p. 3 of the agreement:

3.2 PARTNERS recognizes Local as the exclusive representative of all employees performing work covered by this AGREEMENT with respect to wages, hours, and working conditions.

sel's Exhibit 17,<sup>7</sup> and (3) an agreement between The Strand Theatre Shreveport Corporation and Stage Local 298 effective August 1, 1993, through July 31, 1996, General Counsel's Exhibit 18.<sup>8</sup>

The 30-page "AGREEMENT" that was in effect until August 15, 2004, Respondent's Exhibit 8, contains, as here pertinent, the following language on pages 3 and 26-28:

2.2 STRAND recognizes LOCAL as the exclusive representative of all employees performing work covered by this agreement with respect to wages, hours and working conditions.

....

### 3.0 REFERRAL

3.1 When employees are to perform the work covered by this Agreement, STRAND shall contact LOCAL and furnish LOCAL with the crew requirements according to departmental need. The LOCAL shall furnish employees who are capable, competent, and physically fit to perform the work required.

....

### 37.0 REGULAR EMPLOYEE

37.1 From a group of individuals referred by LOCAL, STRAND shall select one (1) Regular Employee, who shall be designated Master Electrical/Production/Operations Coordinator.

(1) Production and Operations Coordinator/Master Electrician

This position is a second level management position intended to assist with the coordination of all production, physical operation, and custodian personnel. This position is that of a department head and the person in this position answers only to the Executive Director. This position will interact with other department heads when necessary to accomplish tasks which overlap department lines.

Specific areas of responsibility include:

- a. Be present when the Strand Theatre building is in use.
- b. Supervise and exercise control as may be necessary to insure proper and safe operation of stage equipment and Partner's facilities. Be responsible for Strand Theatre building rental arrangements and coordinate technical requirements with road managers, renters, artists, agents and IATSE personnel.
- c. Supervise day to day operations of the Strand Theatre Building, including supervising maintenance agreements, part-time employees and companies hired to perform repairs or special projects, including but not limited to, stage employees, custodians, bartenders and security personnel.

d. Establish and supervise a preventive maintenance program for the Strand Theatre Building and its equipment.

e. Set crew requirements for all events in accordance with the terms of the Strand Theatre-Local agreement. Work to ensure that crew sizes and costs are such that productions are professionally executed while keeping costs reasonable.

f. Perform routine maintenance on all equipment covered by this Agreement.

g. Be responsible for the construction of equipment related to the Strand Theatre-Local Agreement.

h. Be capable of operating all theatrical equipment in the Strand Theatre Building.

i. Perform other duties as may be agreed upon from time to time by employee and Strand.

j. Shall supervise the employees covered by this Agreement to insure proper, professional and efficient performance of their duties. He/she shall be responsible for maintaining, recording or submitting employees' time sheets for approval by STRAND Executive Director. LOCAL agrees that the employees will fully comply with the instructions of the Production Coordinator.

This employee shall not be restricted to performing work falling within strict departmental lines while performing normal maintenance duties.

37.2 To the extent that they are not in conflict with "Special Section-Regular Employee" (§§ 37.0-46.0), all working conditions described in this Agreement shall apply to that Regular Employee.

In addition to that set forth above, the "AGREEMENT" also contains, as here pertinent, language speaking to definitions, a description of the work to be performed, a management's rights clause (*STRAND'S RULES*), grievance and arbitration procedures, disciplinary procedures, job safety and health rights, work crew rules, classifications, wage rates, minimum calls, premium time, fractional hours, meal period, breaks, wash up, parking, business representative access, nature of work, craft departments, payment of wages, referral fee, and annuity contributions.

According to the testimony of Palmer, there has been a relationship between Local 298 and the Strand since 1925.

According to the testimony of Weems, the Strand Theatre had been closed for a number of years, it was owned by ABC Theatres who could not sell it, the Strand Theatre Corporation was formed in the mid-'70s, ABC Theatres donated the Strand in 1975 to that nonprofit group, money was raised to renovate the Strand, he became a Board member in 1979 or 1980, and a group called the Strand Partners was formed by private individuals and companies who committed 1 million dollars up front and then about \$300,000 a year for 14 years which was used to finance the renovation and the operation of the Strand for that period of time. In 1999 contributions under this arrangement ceased.

Weems also testified that the State of Louisiana gave the Strand a grant for \$1,835,000; that the Strand reopened on December 21, 1984, and the Local stage hands performed the stage labor; that he was not involved in the formation of the relationship between the Strand and Local 298 in 1984 since he

<sup>7</sup> The following appears on p. 3 of the agreement:

3.2 PARTNERS recognizes Local as the exclusive representative of all employees performing work covered by this AGREEMENT with respect to wages, hours, and working conditions

<sup>8</sup> The following appears on p. 3 of the agreement:

2.2 PARTNERS recognizes Local as the exclusive representative of all employees performing work covered by this AGREEMENT with respect to wages, hours, and working conditions

had taken a reprieve from the Board for 3 years since he was worn out and needed to go back to his law practice; that he went back on the board shortly after the initial contract was in place between the Strand and Local 298; that he was told that Mike Gorman, who (1) was a consultant hired by the Strand during its renovation phase, (2) became its executive director, and (3) has since passed away, represented the Strand during negotiations with Local 298 over the initial contract; that he did not know if there were written agreements between the Union and the Respondent before 1993, he looked for them, and he could not find them; that he did not review the first contract the Strand had with Local 298 in the mid-'80s and it was in existence when he looked at it for the first time; that he thought that Judd Tooke, who is a lawyer, was the first President of the Strand Board in 1984<sup>9</sup>; that he first became involved in negotiations with Local 298 over the contract between it and the Strand 8 to 10 years before he testified herein (in other words, around

<sup>9</sup> The following appears at p. 275 of the transcript:

"MR. BARKER: We have a stipulation we'd like to enter into. Mr. Weems in his testimony made reference to a man named Judd Tooke who was one of the original formers of the Strand Theater Corporation back in the '70s. Mr. Weems made reference to the fact the Mr. Tooke may have knowledge of the original negotiations and meetings between the Strand and the union. We've agreed to stipulate that Mr. Tooke either was not a participant in those negotiations or has no memory of that, so that he won't be called to testify just to say that, and that there won't be any adverse inference for us not calling him to testify.

JUDGE WEST: So stipulated?

MR. ROGERS: Yes, sir.

JUDGE WEST: Accepted. Proceed."

The following appears on pp. 237 and 238 of the transcript:

Q. Were you on the board of directors in 1984 when the original agreement between the local and The Strand was voted upon?

A. I'm sure I was.

Q. Do you remember—

A. I was on the board, I'm sure. I haven't gone back and looked at those minutes to see if I attended that meeting, but—

Q. Do you remember that vote occurring?

A. Yes.

Q. And at the time you voted as a board of directors member, what was your intent as to the length of the obligation between the Strand and the union?

MR. ROGERS: Objection. This document will speak for itself.

JUDGE WEST: Sustained.

MR. BARKER: I'd like to make a proffer.

JUDGE WEST: Proceed.

Q. BY MR. BARKER: You can answer the question.

A. The—I don't remember whether it was a three- or a five- year term, but there was a term, and that's the way it was explained to the board, was we entered this agreement for a period of time, and that we—once that was concluded, we would have the right to do whatever we wanted to with respect to stage hand labor.

Q. And that was discussed at the meeting before the vote.

A. The best I can recall, yes.

MR. BARKER: That's the end of the proffer.

In view of the apparently conflicting and vague testimony of Weems regarding who played what role in the negotiations and approval of the 1984 agreement, I would not credit the testimony he gave pursuant to the proffer even if I had not sustained the objection of Counsel for General Counsel. It should be noted that Respondent entered into additional collective bargaining agreements covering the remainder of the involved 20-year period.

1995 to 1997); and that to his knowledge there has never been an election for Strand employees conducted by the National Labor Relations Board (Board), there has never been a card check where union authorization cards signed by employees were looked at by management of the Strand, and there has never been a petition of employees stating that they supported Local 298 presented to the Strand for review.

Palmer began working for the Strand in 1984. He was the Technical Director or Regular Employee as described in the agreement between the Union and the Strand. Respondent's Exhibit 8. He described his main job duties as follows:

to facilitate anything having to do with production and take care of the building. I would be handed contracts to do estimates on and get particulars, information, from the client. From then on, set load in times with the renter of the building. And then, once I found out my crew requirements and load in times, send that information on to our business agent, tell him what the particular requirements were, how many carpenters, how many electricians, how many prop men, and crew requirements of the production.

When the crews came in for the shows he checked them in, and while they were working he made sure there were no problems, they followed the rules and everything was done safely. Palmer also maintained the building which included plastering, painting, and repairing seats. He has been a member of Local 298 since 1983 and, as here pertinent, was elected President of the Local in December 2001 for a 3 year term. As President of the Local he runs meetings and negotiates contracts.<sup>10</sup>

Mobley, who became the Executive Director of the Strand Theatre of Shreveport Corp. in 1995, testified that she was involved in negotiating the agreement between the Strand and Local 298 which was effective August 1, 1996 to July 31, 1999, Respondent's Exhibit 27, and she signed it;<sup>11</sup> that she was involved in negotiating the agreement between the Strand and Local 298 which was effective from December 15, 1999 to December 14, 2002, Respondent's Exhibit 8, and she signed the agreement;<sup>12</sup> that in 1999, before she negotiated with Local 298, she tried unsuccessfully to find an alternative labor force;

<sup>10</sup> On cross-examination Palmer testified that one of the things that the Strand did to try to cut expenses and costs was to have him share the operation of the Strand's bar with Mobley; that in Shreveport that required him to fill out an application for an Alcoholic Beverage Operator (ABO) card; that he lied on the application but it was not knowingly done; and that he was arrested and he pled guilty to false oath. On redirect Palmer testified that this occurred in about 2000; that the penalty was a \$151 fine; that one of the questions on the ABO card application inquired whether the applicant has ever been arrested for solicitation of prostitution; that he had been caught in a sting in Bossier City, he pled guilty under "Article 192" in 1989, and it was not supposed to go on his record; and that when he filled out the form for the ABO card he answered "no."

<sup>11</sup> The following appears on p. 3 of the agreement:

2.2 STRAND recognizes LOCAL as the exclusive representative of all employees performing work covered by this agreement with respect to wages, hours and working conditions.

<sup>12</sup> The following appears on p. 3 of the agreement:

2.2 STRAND recognizes LOCAL as the exclusive representative of all employees performing work covered by this agreement with respect to wages, hours and working conditions.

that in 1999 the union membership voted against the Strand's proposal to delete the Regular Employee from the contract; that the proposal was made because the Strand believed that "[I]t would be impossible . . . to serve the best interests of both the Strand and the union with the same person" (tr. P. 279); that the Strand wanted to delete the Regular Employee because he was the only person who had a contract, the contract guaranteed him a 40-hour week, most of the shows are in the evening or on the weekends, this means that after 5 p.m. the Regular Employee is at time and a half, which goes to double time and could go to triple time, and this costs the Strand and renters of the Strand Theatre a lot; and that she is part of a group, along with Weems, that is obligated against a credit line for \$100,000 which is used by the Strand, and her personal liability is \$10,000.

Respondent's Exhibit 1 is a letter dated October 14, 2002, from Palmer, as president of the Local, to Mobley. It reads as follows:

As you are probably aware, the agreement between Local 298 and The Strand theatre Corp. will expire on December 14, 2002. We have enjoyed our employment at the theatre and would very much like to continue our contractual relationship. It is going to get busy fast as the season approaches. We will try to make ourselves available as possible to discuss a new and equitable agreement.

Please let me know what dates are good for you. We will adjust as necessary.

By letter dated November 26, 2002, Respondent's Exhibit 2, Mobley requested that Local 298 extend the contract until June 30, 2003. The request was granted.

Weems became President of the Strand Board in June 2003. He testified that one of the first things he did was to "scrub the budget;" and that the Strand did not replace the box office manager when she left. Mobley testified that the box office manager left to go to the Arena, someone was moved from upstairs to the box office, and Respondent did not replace the person who was moved from upstairs.

By letter dated June 24, 2003, Respondent's Exhibit 3, Weems requested Local 298 to extend and agree to continue working under the terms and conditions of their last agreement for a period of 12 months. And by letter dated August 19, 2003, Respondent's Exhibit 5, Palmer advised Weems that Local 298 membership voted unanimously to honor Weem's request. Respondent's Exhibits 7 and 6 are the amendment covering the extension to August 15, 2004, and the cover letter, respectively.

According to the testimony of Fogger, in April 2004 he spoke with representatives of the Athalon Group about providing stage hands. At the time, Athalon, which is from New Orleans, was setting up a show at the CenturyTel Center, which is about 6 miles from the Strand. Fogger asked for their rates and found out that a majority of the work force Athalon used at the CenturyTel Center was from the local area.

At the July 22, 2004 negotiation session Fogger told Palmer that he would be put on administrative leave with full wages and all of his benefits. When called by counsel for General Counsel, Fogger testified that the decision to take this action was reached during a conversation a few weeks before July 22,

2004, between him, Weems, Mobley, and Price Barker, who is the Respondent's attorney; that there is verbiage in the contract that the Strand had with the Union which covered a Regular Employee and that contract expired on August 15, 2004; that Palmer could have been left in his job until August 15, 2004, but Palmer, who was the President of the Local Union at the time, jokingly told Fogger that the former President of the Local Union, Bill Carrier, had sabotaged equipment at the CenturyTel Center when he was working there, and Carrier was not punished by the Union even though the Union was asked to leave the CenturyTel Center and not work there anymore; that he did not want to run the risk of having any of the Strand's equipment sabotaged by Palmer between July 22 and August 15, 2004; that he discussed the matter with the general manager, the assistant general manager, and the events coordinator of the CenturyTel Center months before July 22, 2004; that Palmer was put on administrative leave because of the sabotage potential in that Palmer, as the Strand's Regular Employee, had free run of the building and he had a key to every lock; and that it was his understanding that the position of Regular Employee was created by the contract between the Strand and the Union, it had been a part of the contract, and when the contract expired, the position would no longer exist.

In response to questions of Respondent's counsel, Fogger testified that at the July 22, 2004 negotiation session he told the union representatives who were present, Palmer and Gaston, that The Strand did not feel like it had any further obligation to the Union after the contract expired; that Palmer was shocked by this statement; that Mobley and Weems were present at this session; that "Local 298 had done a pretty good job in the building, [w]e felt like we owed it to them to come to the table, and state our financial position, and just tell them that, you know, we're financially in a deficit, and we have got to reduce expenses, and we felt obligated to negotiate with them" (tr. p. 59); that Respondent's Exhibits 9, 10, 11, and 12 are Internal Revenue Form 990s for the Strand Theatre of Shreveport Corporation which indicates that for the 1-year periods ending May 31, 2001, May 31, 2002, May 31, 2003, and May 31, 2004 it had a deficits of \$371,488, \$144,481, \$181,995, and \$181,455, respectively; and that The Strand has reduced its full-time staff by three positions in the last couple of years, Respondent's Exhibits 13 and 14.<sup>13</sup>

Palmer testified that he and Gaston represented Local 298 at the July 22, 2004 negotiation session;<sup>14</sup> that the Strand repre-

<sup>13</sup> Regarding R. Exh. 13, J. P. Byrd was notified by letter dated April 18, 2005, that his position of production supervisor was eliminated. Byrd was hired by the Strand in September 2004. Fogger testified on redirect by counsel for General Counsel that Byrd was hired to be the supervisor, to maintain a crew of stage labor employees and to make sure that certain tasks were performed; that usually Byrd notified Athalon what crew they would need to send but he did it sometimes; that it was Byrd's job to supervise the Athalon crew to take care of any problems as they arose if he had the ability and to notify him; and that Byrd held a salaried position, no overtime, at \$38,500 a year. Respondent's Exh. 14 is a letter to Heather Stimits dated April 18, 2005, indicating that her position of Secretary-Receptionist was eliminated.

<sup>14</sup> Counsel for General Counsel and the Respondent stipulated that the testimony of Gaston as to what occurred and what was said at the

sentatives opened the meeting asking him what the Local wanted; that he replied that all the Local wanted was a cost of living increase, health insurance for the Regular Employee, and a way for the employees to purchase tickets at a discount; that Weems said that the Strand was having financial difficulties, they had been operating at a deficit for a number of years, he thought he could get labor 40 percent cheaper from another labor provider, and he wanted to know what Local 298 could do to help; that he told Weems that he did not think Local 298 could give a 40 percent reduction but he would poll the members to see what could be achieved; that Weems told him that the position of Regular Employee was going to be eliminated, he was being placed on paid administrative leave until the contract expired, and he was asked to turn in his keys and credit cards and remove all of his personal tools and belongings from the building; that when they negotiated the prior contract 3½ years earlier there was talk that the Strand wanted to eliminate the Regular Employee from the contract but the Union wanted him to continue working there; that the Strand wanted him and the Union to staff two upcoming shows, namely the 156th Army Band and the LSU School of Allied Health graduation; and that he went to the Strand Theatre, he was escorted around by Sergeant Smith and another policeman, and he got all of his personal belongings out of the building.

Weems testified that he tried to give Local 298 a chance to do the stage labor at the same rate as Athalon; that Local 298 was told that it had to change not only its hourly rate but the burdensome requirement of a call-out of five to six people on shows when only one or two were needed; that it was the annuity benefits that Local 298 wanted; that it was the additional labor cost if the Strand used Local 298; that he, Fogger, and Mobley represented the Strand at the first negotiation session on July 22, 2004; that Palmer and Gaston represented Local 298; that he advised Palmer that the Strand was going to explore other options to provide stage labor; that Palmer's request to extend the agreement for 30 days was denied; and that after speaking with Fogger and Mobley, he decided to place Palmer on paid leave of absence to protect the property of the Strand.

Mobley testified that she agreed with the decision to place Palmer on leave of absence "to protect our investment." (Tr. p. 285.)

On redirect by counsel for General Counsel, Fogger testified that he first talked with Tom Williams of CenturyTel Center about someone tampering with a chain motor in 2003.

On or about July 23, 2004, Fogger arranged with Athalon to provide T-shirt security, unarmed security personnel, to shadow the union stage hands during the July 30, 2004 Army band concert performance at the Strand. Fogger testified that Athalon employees were hired because he wanted someone familiar with stage labor, stage equipment, and theatrical equipment to be present while the union stage hands were working this performance, after they had been told that the Strand wanted a reduction in rates in that the existing contract between the Strand and the Union was about to expire, and the Union had

been told that the Strand did not believe that it had any obligation to Local 298 after August 15, 2004; and that prior to this the Strand had not had any problems with sabotage. (GC Exh. 14(s)).

Weems testified that he discussed T-shirt security with Fogger and Mobley because of the sabotage efforts at CenturyTel Center, and Athalon was chosen because it was providing stage labor at CenturyTel, management there indicated that Athalon would be their choice, and Athalon personnel would know what the sound board man and the light board person should be doing. On cross-examination Weems testified that to his knowledge there had not been any sabotage at the Strand at that point in time.

By letter dated July 27, 2004, General Counsel's Exhibit 2, Donald Gandolini, Jr., who is an International Representative for the I.A.T.S.E., was assigned by the president of the International to assist the membership of Local No. 298 in its negotiations with the Strand Theatre of Shreveport Corp.

Palmer testified that when he arrived at the Strand Theatre to load in the 156th Army Band employees, of the Athalon Group were there; that he asked Fogger about it and he was told that the Athalon Group was T-shirt security to watch the union members to make sure nothing would happen to the Theatre; that he told Fogger that he would feel better if he had a policeman inside the building to watch the Athalon Group so that no hostilities would occur, and Fogger agreed; that the Athalon Group employees stayed a few feet from the union members while they worked; and that the union members got to the Theatre at 1 p.m., loaded in for 4 hours, had dinner for 1 hour, worked the show, loaded out immediately after the show, and finished up at 11 p.m.

Gaston testified that he worked the Army Band job, which event occurred within 2 weeks of the expiration of the contract; that he saw five people standing outside the theatre all dressed in black; that he and Palmer asked Fogger about these individuals and they were told they were T-shirt security to make sure the union members did not do anything out of line; that Palmer asked to have a police officer present and Fogger agreed; and that one of the T-shirt security individuals stood near him all day long from about 8 a.m. until after 10 p.m., except during his lunchbreak.

Gandolini sponsored General Counsel's Exhibit 3, which is a printout of some Internet research that he had conducted on August 4, 2004, on the Strand Theatre to get an overview of their financial status. Gandolini testified that the printout shows that for the year 2003 the Strand operated at a deficit of \$181,000. The exhibit shows that the Strand had assets of \$4,810,103 and liabilities of \$287,201.

The first negotiation session Gandolini participated in was held on August 13, 2004. He testified that General Counsel's Exhibit 4 are his notes of this meeting; that at the meeting Weems said that the Strand was in dire straights financially, they were looking to stop the bleeding, they had lost money the previous years, and they were looking for other options as far as their labor; that Weems said that they were looking to reduce wages by 40 percent and he asked the Union if it could do the payroll or find a third party to do the payroll; that Palmer indicated that the Union had a relationship with a payroll service

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2004 negotiation sessions described below would be essentially the same as the testimony of Palmer and Donald Gandolini and there was no need to elicit this cumulative testimony.



which could do the payroll; that the Union was asked if it could present a written proposal and it was indicated that one would be provided at the next meeting; that the Union requested the Strand's financial records and Weems indicated that he would provide whatever was available to the public; and that they then set the next meeting date.

Palmer testified that he participated in the negotiation session on August 13, 2004; that they discussed T-shirt security and Weems said that even with T-shirt security there was some sabotage in that spike marks, which are tape marks on a rope to indicate how far a rope should be pulled in order to avoid damage, were taken off the fly rail; that the spike marks are supposed to be removed on a show by show basis; that he explained to Weems that the fly rail spike mark situation was not sabotage but rather normal day-to-day practice; that during the 156th Army Band event a policeman stopped Union Member Greg Pyatt from removing the spike marks on the fly rail even though Pyatt explained that they needed to be taken off;<sup>15</sup> that he explained to Weems that it was necessary to remove the spike marks at the end of the production;<sup>16</sup> that the Union was asked if they would still do the LSU Allied Health event, and they said they would fulfill their contractual obligations; and that they were asked if they would work under the conditions of their new proposal and they said they would. Palmer further testified that he never sabotaged equipment at the Strand, he never threatened to sabotage equipment at the Strand, and he worked hard to keep all of the equipment at the Strand working.

Gaston testified that the spike marks (tape marks) are placed on the fly rail as they do the show when they determine where different parts have to be; that all spike marks are removed at the end of a show in that they are required to remove all spike marks to return it to its original state so there would not be confusion on the next show; that their contract requires them to remove all spike marks; and that it is just standard procedure in every house they are in, it just prevents confusion on the next show.

Fogger also arranged with Athalon to provide T-shirt security for the LSU Medical Center graduation on August 14, 2004, at the Strand, which was worked by Local 298 stage hands. General Counsel's Exhibit 14(r). In response to questions of the Respondent's attorney, Fogger testified that after the August 14, 2004 event he discovered some problems with the sound and light boards and the rope brakes had been loosened but he did not know who caused the problems. On redirect by counsel for General Counsel, Fogger testified that the sound board is on a console platform and he found six disconnected cables behind the console; and that the on stage lighting problem was caused by a switch which had been flipped to the wrong setting. Fogger testified that the lights and the sound worked throughout the August 14, 2004 event.

<sup>15</sup> Police officer Mark Rogers testified that an Athalon employee told him that "they were removing tape from the fly ropes on the stage" (tr. p. 273); and that when he checked it out he was told they were tape cues, the stage hand Union had put the tape cues on, and they could remove the cues.

<sup>16</sup> Palmer also testified that at the negotiation sessions there was mention of sabotage to the light and sound boards.

Palmer testified that six union members worked the LSU School of Allied Health graduation and six Athalon employees were at the Theater as T-shirt security following the union members around.

Gaston testified that he worked the LSU graduation event at the Strand and the Athalon T-shirt security employees shadowed the union members.

After August 15, 2004, Athalon has provided all of the stage labor for the Strand, including light technicians, spotlight operators, and the supervisor, who is designated by Athalon as the steward. (GC Exhibit 14) In response to questions of the Respondent's attorney, Fogger testified that while Palmer could have been kept on as an employee after the extension of the contract expired on August 15, 2004, the Strand chose not to because of "[c]ost. . . . The position that Mr. Palmer had, as I said, was approximately a \$49,000 to \$52,000 position. We just simply couldn't afford it." (Tr. p. 68.)

Weems testified that Palmer's employment as Regular Employee ended on August 15, 2004, because the agreement had expired; that the Strand could have continued Palmer's employment even though the agreement had expired but he chose not to because Palmer was not doing as good a job as he had initially and the Strand probably should have terminated him as the Regular Employee a year earlier; that Palmer did not continue after the contract expiration because he, Weems, was "[j]ust not satisfied with his job performance" (Tr. p. 251.); that for years he had been trying on behalf of the Strand to get the Regular Employee out of the agreement because he believed that having the President of Local 298 as the Regular Employee who determined how many people had to be called out for a show was a conflict of interest; that he believed that "it was a conflict of interest for stage labor to be telling management . . . how many people they needed to put on the job" (Tr. p. 251.); and that he believed that it "was really strange to have the representative of the union [Palmer] there trying to—who also was drawing a paycheck from The Strand Theatre, to negotiate those terms and conditions, and [I] really objected to it" (Tr. p. 252.). On cross-examination Weems testified that he never discussed any problems with Palmer's work performance with him; that he did discuss Palmer's lack of work performance with Fogger and Mobley on several occasions; and that in the past he tried to eliminate the position of Regular Employee but because the Strand did not have another labor source that was qualified it had to accept that provision in the contract or run the risk that it was going to lose its season. On further cross-examination Weems testified that from when it reopened on December 21, 1984 until August 15, 2004, the Strand did not use any other stage hand labor force other than Local 298.

Mobley testified that Palmer's employment ended because

Lack of trust. I mean, besides the contract expiring, we would have not wanted to keep Mr. Palmer on staff, especially the trust issues after he had given the stage hands and himself a 3 percent raise in all the quotes that he'd done after the contract expired. I was working with those estimates in to price the season, and I had no idea that they were—had an increased rate. [Tr. p. 286.]

Mobley further testified that Respondent's Exhibit 29 is an estimate given to a client, someone who rents the theatre, to let them know what their expenses are most likely going to be; that Palmer prepared the estimated expense addendum; that she received the document because the client changed the date of her production from July 10, 2004 to September 25, 2004, the labor cost increased, and the client did not understand why; that Fogger asked Palmer why he increased the estimated labor costs and Palmer told him that he anticipated a 3 percent raise;<sup>17</sup> that after the client spoke with Fogger about the difference the client spoke with her about the increase in the estimate; that another reason that she did not want Palmer to continue working for the Strand is that she found labor reports where he overcharged for himself and the other stage laborers in that (a) Palmer is paid by the Strand on a weekday from 9 a.m. to 5 p.m., the Strand does not charge the promoter or the client for that time because Palmer is already being paid, and she found pay reports where he put his name down to a renter for that period of time, namely 9 a.m. to 5 p.m., and (b) there are two different rates to pay stage hands, namely a commercial rate and a theatrical rate, with the former, which is about 10 percent higher than the latter, being used if it was a production and it was going to be televised or recorded for sale, and she discovered that Palmer charged the commercial rate for all the stage hands who worked the Loyola High School graduation and a gospel play; and that she spoke with Palmer about being paid twice for the same time and she thought that it had stopped but she found more labor reports indicating that he had done the same thing. On cross-examination Mobley testified that she spoke to Palmer after Fogger spoke to him about increasing the estimated labor costs for the above-described show which was rescheduled to September 2004, Palmer said that he was sorry but he was anticipating a wage increase of 3 percent; and that this discussion had to take place before July 22, 2004; that the first time she found the labor reports she discussed with Palmer was in 1996 or 1997 but she was not sure of the year; that Palmer told her that that was the way it had always been done, namely charging the promoters for time he was already paid for by the Strand; that the last two labor reports she recalled seeing which were overcharges were the Loyola High School graduation and the Gospel play; that she did not see the Loyola High School graduation and the Gospel reports until March 2005; and that she was sure that she discussed with Fogger those things that Palmer had done before Palmer was terminated. Subsequently Mobley testified as follows:

I saw his termination as part of the contract expiring, but because of the behavior ... the ones that had happened initially, that would have probably influenced whether I wanted Steve Palmer to stay in the employ of the Strand, if that makes sense. [Tr. p. 306.]

Mobley further testified she, Weems, and Fogger discussed their dissatisfaction with Palmer's performance. She also testified that she believed that they even said that if the Regular

Employee continued, it would not be Palmer. Neither Fogger nor Weems corroborated Mobley on this point.

Gaston, who became the business agent of Local 298 in January 2003, testified that one of his job duties is to administer the call list; that he has people on the list who work in the theatre and he tries to keep the same people working in the same building because they are familiar with it; that he found out about labor calls from the Strand Theatre from Palmer who told him the department head status, how many assistants for each department, truck loaders, et cetera; that he had not had any calls for labor from the Strand Theatre since August 15, 2004; and that the Strand accounted for about 25 percent of the Local 298's overall income which is based on a 5 percent of their pay referral fee for each worker who works at the Strand Theatre.

Gandolini's notes of the August 18, 2004 negotiation session were received as General Counsel's Exhibit 6. Gandolini testified that Respondent's Exhibit 15 is the Union's written proposal which was compiled by Palmer and which was presented to the Respondent at this meeting; that the Union's proposal was in the form of proposed changes to the existing agreement, Respondent's Exhibit 8; that the major points of the Union's proposal were (1) since the Respondent had already terminated the position of Regular Employee, the Union agreed to delete this language from the agreement and add different language so that Palmer would be the first person called to work at the Strand, and (2) to decrease wages by 2 percent in the first year of the new agreement, then increase the wages in the second year of the agreement to basically get the Union back to the point it was the previous year, and then in the third year of the agreement, if the Strand had turned its financial woes around, look to get an increase; that Palmer went through the Union's proposal at this meeting; and that when the Respondent asked what the Union would charge for working an upcoming press conference, the Union ultimately responded that it would use the proposed 2 percent wage reduction across the board in all wage categories.

Palmer testified that he presented the Union's written proposal, Respondent's Exhibit 15, at the August 18, 2004 negotiation session; that he went item by item and explained the proposal; that it was inevitable, the Strand wanted to delete his position, and the Union agreed to delete the Regular Employee position; that he proposed different wording to make up for this change and to have language in the contract with respect to minimum crews; that the Union proposed a 2 percent reduction in wage rates the first year of the contract, a 2 percent increase the second year, and a 5 percent increase in the third year; that in response to the Strand's request, the Union proposed having a third party, Entertainment Technical Support, handle the payroll; that the Union proposed taking a 4.5 percent cut on retirement benefits (a 3 percent contribution instead of the then current 7.5 percent annuity contribution); that the Union proposed that all employees covered by the agreement shall be considered Friends of the Strand and eligible to purchase tickets at a ten percent discount so they could afford to bring their families to show them what they were doing; that the representatives of the Strand said that the Union was moving in the right direction but they would have to meet with their board members to make any decision; that the representatives of the Strand asked the

<sup>17</sup> This testimony was not offered for the truth of the matter asserted but rather to show the background of the documents and how Mobley became involved.

Union if it was willing to work pursuant to its proposed reductions for an upcoming event; and that the Union replied that it was willing to do this. Palmer further testified that he and the Local did not want to lose the Regular Employee position but they realized that it was something the Strand really wanted in that the Strand had indicated in prior negotiations that it did not like the Regular Employee being the President of the Local; and that the Strand eliminated the position of Regular Employee before the Union made its August 18, 2004 proposal.

Gandolini testified that he received General Counsel's Exhibit 7, which is the 15 page Internal Revenue form 990 for the Strand for the year ending May 31, 2003. The document has a fax date of August 19, 2004, and shows a deficit of \$181,995.

Gandolini's notes of the September 1, 2004 negotiation session were received as General Counsel's Exhibit 8. Gandolini testified that Weems told the Union that the Strand needed more of a decrease than proposed by the Union; that Weems compared the Union to Athalon, indicating that unlike the Union, Athalon (a) does not require a minimum crew for certain things, (b) has a different overtime structure on a daily basis, on Sundays, and on holidays, in that Sundays are not considered overtime by Athalon and Athalon charges time and one half for holidays while the Union charges double time, (c) has a different structure for performances in that Athalon does not charge for performances but rather just for running time, (d) has less restrictions on overtime, (e) computed their time in half hour increments while the Union computed its time in one hour increments, (f) would work without a contract, and (g) switches employees from one department to another; that Weems indicated that there were some problems with the light and sound boards and it was disappointing that these types of issues were arising; that Gaston said that the union people would not do that, they had been working in the building forever, and why would they jeopardize their jobs; that Weems said that he was waiting for a proposal from Athalon showing the cost of doing work on specific upcoming projects and he could not respond to the Union's proposal but it was not cutting enough; that the Union proposed to have Palmer compensated as the on-call steward; that Weems said that the Strand was looking to perhaps not use the Union and go elsewhere; that he told Weems that no matter what he did the Strand had greater financial problems than either the Union of Athalon could solve; that the union negotiators requested the Strand to give them something in writing; and that the next meeting, which was scheduled for September 15, 2004, was rescheduled to September 22, 2004, because of a hurricane. Weems testified that the reference to "would you consider KTBS major sponsor prevented from doing work under CBA" on page 2 of Gandolini's notes of the September 1, 2004 negotiation session refers to a discussion during negotiations about the fact that KTVS, which is the Strand's media sponsor, wanted to come into the Strand Theatre, invite some of their advertisers, do a video presentation of the highlights of their new upcoming season, bring in their own sophisticated equipment including a lot of video equipment, and use their own technicians to operate the equipment; that under the contract the Strand had with Local 298 that could not be done; and that these kinds of situations can hurt the Strand.

Palmer testified that he attended the September 1, 2004 negotiation session.

Gandolini attended the September 22, 2004 negotiation session. His notes of the meeting were received as General Counsel's Exhibit 10. He testified that at this meeting the union representatives were given the following document, General Counsel's Exhibit 9, by the Respondent's representatives:

The Strand Theatre of Shreveport Corporation has reviewed the proposal submitted by Local 298 of the IATSE. This proposal, as submitted, is unacceptable. The following are the terms and conditions that the Strand Theatre proposes:

1. The Strand will not enter into any CBA contract with Local 298 at this time.
2. Wages for local 298 must be reduced by 20% across the board.
3. No minimum crew required.
4. Time and one half will begin on Sundays after 8 hours have been worked.
5. Work performed between 12am-9am will not be paid at time and one half.
6. Holidays worked will be paid at the rate of time and one half.
7. Performance pay (flat rate) is eliminated.
8. Fractional hours worked will be paid in half hours rather than full hours.
9. Strand will request and deny, at will, members of Local for employment.
10. Strand will decide, in its sole discretion, whether to use Local or its employees. Neither Local or its employees will have any exclusive relationship with Strand or its work.
11. If Strand decides to use Local, Strand will determine and request the number of Local employees to work event(s).
12. Local 298 agrees to work with employees not referred by Local. (split crew)
13. Local 298 is allowed to designate one (1) employee to act as the supervisor for Local employees, per event worked. This employee is to be paid the rate of a department head. All other local employees working to be paid the rate of Assistants. There will be no rate for Department Assistants.
14. Local is not allowed to purchase tickets early or at a discount.
15. No annuity or other fringe benefit payment(s) will be made by Strand.
16. Local to invoice Strand after every event worked.
17. Local provides Strand with proof of liability insurance in the amount of \$1,000,000.
18. Local responsible for processing payroll for Local employees.
19. Local to provide and pay workers compensation coverage. (proof required)
20. Strand agrees to pay invoice for labor worked within 5 business days.
21. Local agrees to work under the supervision of person(s) designated by Strand.
22. Rates for Local employees will not vary, depending [on] type of event held.  
(Commercial Rates eliminated)

23. Rates for Local will not vary, depending on tenure. Local employees to be paid the applicable rate for the position worked. (either Supervisor or Assistant)

24. Local will post a cash bond, letter of credit, or insurance bond with a AAA rated company, satisfactory to Strand, in the amount of \$250,000.00.

Gandolini further testified that the Union did not agree with 1 of Respondent's above-described September 22, 2004 proposal since the whole purpose of the negotiations was to obtain a successor collective-bargaining agreement; that regarding 2, Palmer proposed an 8 percent reduction in wages across the board; that the Union agreed to 3; that the Union answered no to 4 but he wrote "maybe" in his notes to indicate that perhaps this was an area where additional concessions could be made; that the Union answered no to 5; that with respect to 6, the Union indicated that it would agree to going the first four hours at time and one half and then revert back to double time; that regarding 7, the Union would agree to an 8 percent reduction in performance pay; that the Union agreed to 8; that the Union did not agree to 9 or 10; that the Union pointed out that 11 was the same as 3 and it agreed; that the Union did not agree to 12 and it told the Strand representatives that if they had any employees in mind, they could come sign up with the Union's hiring hall and the Union would refer them to the work; that the Union did not agree with 13 and 15; that the Union agreed with 14, 16-20, and 22; that the Union asked for but did not receive clarification as to who the person would be in 21; that the Union agreed to part of 23 but he could not recall which part; that regarding 24, the Union asked for clarification on why and the Strand representatives indicated that they wanted a bond to ensure that there would not be any vandalism or sabotage of their equipment; that after Palmer went through all of the Union's responses to the Strand's proposals, Weems asked when the Union wanted to set the next meeting; and that September 30, 2004, was chosen for the next negotiation session.

Palmer testified that he attended the September 22, 2004 negotiation session; that the Strand's proposal, General Counsel's Exhibit 9, was discussed line by line; that regarding item 1, the Union told the Strand representatives that the whole reason for them being there was to try to negotiate a collective-bargaining agreement; that they told the Strand representatives that they were not sure they could staff the events at a 20 percent wage reduction; and that they discussed the Strand's proposals but he did not think they agreed to anything but rather they told the Strand representatives that they would meet with their membership and determine what accommodations could be reached.

The next negotiation session was held on October 11, 2004. Gandolini testified that General Counsel's Exhibit 12 is a document that the representatives of the Strand presented at this meeting. The document specifies the Strand's original proposal, the Union's response, and the Strand's response to the Union's response. The document indicates (a) that the Strand "stands" on its proposals described above in 1, 4, 7, 9, 10, 12, 13, 15, and 23, (b) that the Union has agreed to the Strand proposals described above in 3, 8, 14, 16, 17, 18, 19, 20, 21, and 22, and (c) that Strand would not enter into a "CBA" at this time, it wanted an across the board wage reduction of 18 percent, work

performed by Local between the hours of 26 a.m. be paid at the rate of "1.5X" the regular rate, holidays worked would be compensated at "1.5X" rate for first 4 hours worked and at "2X" rate for the remainder of the time worked, if Strand decides to use Local, Strand will determine the number of employees that can safely perform the work and request the number of Local employees to work the event(s), and Strand agreed to explore possibilities for ticket discounts but Local members not to be automatically considered a Friend of the Strand unless the necessary contribution is made. Gandolini testified that Weems read through the Strand's proposal; that the Union then caucused and decided that the Strand did not want to enter into a collective-bargaining agreement, and they then told the representatives of the Strand "[l]et's adjourn and we'll get back to you later" (Tr. p. 137); that the Strand's representatives said "[o]kay call us whenever you all want to get together" (Id.); and that the Union never called the Strand to set another date for negotiations and, to his knowledge, the Strand never proposed additional dates for negotiations. Gandolini's notes of this meeting were received as General Counsel's Exhibit 11. Gandolini further testified that during negotiations the Strand never questioned the Union's majority status and it was not an issue during negotiations.

Palmer testified that he attended the October 11, 2004 negotiation session; that Weems went through General Counsel's Exhibit 12 item by item; that General Counsel's Exhibit 12 is an accurate reflection of what the Union's position was from the prior meeting; that he did not recall any other position changes on the part of the Union at this meeting; that they discussed the fact that while the Strand was asking for a 20 percent wage reduction, it was really asking more than a 20 percent wage reduction because it also wanted to eliminate the department head status and only have two rates, one as a supervisor and one as an assistant; that under that recently expired agreement there were four different rates; that he explained that the Strand was really proposing a 37 percent pay cut for Department heads, who went to school to learn their craft and would not stay in Shreveport at that big a pay cut but the Strand wanted to stand by their proposal; and that he believed the Union told the Strand that it would talk with its membership and see if there was anything else they could give the Strand and the Union would write a response.

By e-mail dated October 27, 2004, Respondent's Exhibit 20, Palmer advised Mobley, a member of the Strand's negotiation committee, as follows:

Local 298 had held an emergency meeting to discuss the status of contract negotiations between the Strand and the Local. Great concern was voiced. Our members want us to continue bargaining in good faith and try to reach an agreement.

We can move in your direction some more and propose to reduce wages 8.5% across the board.

We can also eliminate all Annuity contributions.

Local 298 requests through the Freedom of Information Act the Rates and Conditions our replacements are enjoying.

We would like to meet as soon as possible. I can make myself available at any time. Please let me know your available dates.

Palmer testified that he never received a response regarding possible dates to meet again after this e-mail.<sup>18</sup>

On November 13, 2004, the Union had an informational picket line at the Strand during the load in for the play *Rent*. Palmer testified that there were 18 pickets from 7:30 until 9:30 a.m.; that they walked up and down the sidewalk carrying signs which read "The Strand Theatre is unfair to its employees;" that there was a crew of Athalon employees present; and that for the start of the show, 23 union members picketed again that day from 6:30 to 7:30 p.m. and they also handed out leaflets which explained the Union's position and the trouble it was having negotiating with the Strand Theatre.

Palmer testified that on November 18, 2004, the next quarterly general membership meeting was held and he discussed the Strand's proposal with the members; and that the membership agreed to an 8 to 8.5 percent reduction, which would make the Strand Theatre the lowest paying employer that the Union had.

Gaston testified that union members picketed three times at the Strand Theatre; that the first time they picketed it was 7:30 a.m. and they stayed until 11 a.m. when the load in was completed but he was not sure if it was for the play *Rent*; that the 8 to 12 people carried picket signs which indicated that "The Strand was unfair to . . . , Local 298, not to buy tickets" (tr. p. 207); that the Union picketed for the load in for *Les Misérables* and during the opening of the show the night it opened; and that when they picketed in the evening they handed out leaflets explaining the situation.

Mobley testified that this year is the lowest ticket sales the Strand has had since she has been there and last year was just a little bit better. On cross-examination she testified that by this year she meant the 2004—2005 season which ran from October 2004 to April 2005 and that she has been there since the 1995—1996 season; that during the 2003—2004 season the Strand sold 58 percent and during the 2004—2005 the Strand sold 55 percent excluding the last day of ticket sales, the Friday before she testified at the trial herein.

<sup>18</sup> As noted above, the charge in this proceeding was filed on November 18, 2004. Also, as noted above, certain of Respondent's Exhibits were stipulated into the record. As here pertinent, these include (a) R. Exh. 19, which is an undated document with Palmer's name at the top which refers to Palmer's October 27, 2004, e-mail to Mobley and responds to that e-mail by requesting additional information from Palmer, (b) R. Exh. 21 which is an e-mail to Palmer from Fogger dated December 8, 2004 the body of which reads "It has been nearly three weeks (meaning on or about the time the charge was filed) since the Strand responded to you and Local 298. We have not received a response from your organization. Are you or your representatives going to respond at all? When,?" (c) R. Exh. 22 which is an e-mail to Palmer from Fogger dated December 16, 2004 requesting a written response to the Strand's October 11, 2004 written submission, (d) R. Exh. 23 which is an e-mail to Palmer from Fogger dated January 4, 2005, reiterating the Strand's request for a written response to the Strand's October 11, 2004 written submission, (e) R. Exh. 24 which is the Union's response, dated January 31, 2005, to the Strand's October 11, 2004 written submission, (f) R. Exh. 25 which is an e-mail dated March 25, 2005, to Palmer from Fogger indicating that the attached is the Strand's response to Local 298's response, and (g) R. Exh. 26 which is the Strand's response to Local 298's response.

#### ANALYSIS

Taking the alleged 8(a)(1) and (5) violations of the Act first, paragraphs 13 through 17 of the complaint collectively allege that Respondent violated the Act by (a) about August 15, 2004, eliminating the position of Regular Employee, and by failing and refusing since August 15, 2004, to use the Union's hiring hall in hiring its employees, both of which subjects relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purpose of collective bargaining, and both of which actions were taken without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct, and (b) since about September 22, 2004, insisting that it will not reach an agreement on a collective-bargaining agreement, insisting on changing the scope of the unit, and with other conduct has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit.

On brief counsel for General Counsel contends that the Respondent has maintained agreements with the Union since it reopened in 1984 and, as demonstrated by the collective-bargaining agreements introduced at the trial herein, Respondent recognized the Union as the exclusive-bargaining representative for stage employees; that while the initial recognition took place without an election and without any showing that the employees wished to be represented by the Union, the agreement was never challenged by the filing of a charge within 6 months of the agreement's execution and it can no longer be challenged under either Section 8(a) or 8(b) of the Act, *Tarmac America, Inc.*, 342 NLRB No. 107 (2004), and *Route 22 Toyota*, 337 NLRB 84 (2001); that the relationship between the Respondent and the Union has matured into a Section 9(a) relationship, which cannot be dissolved by Respondent without either a Board election or a showing that the Union no longer represents a majority of the employees covered by the agreement, *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001); that Respondent, which was obligated to bargain in good faith with the Union in 2004 for a successor agreement, bargained in bad faith in that (1) Respondent indicated that it had no intentions of entering into another collective-bargaining agreement with the Union after August 15, 2004, (2) Respondent made unilateral changes even before the expiration of the collective bargaining agreement which was expiring on August 15, 2004, when it placed the Regular Employee on administrative leave, and it indicated that it was going to unilaterally eliminate the Regular Employee position, (3) Respondent ceased using the Union's hiring hall and has only used stage labor provided by Athalon, (4) Respondent did not wait until negotiations stalled and impasse was declared before replacing the Union, and (5) Respondent proposed that the Union not have any exclusive relationship with it; that Respondent met with the Union not because of the Respondent's continuing bargaining obligation but rather to see if it could get the Union to underbid Athalon; that the 'refusal to negotiate to reach a collective-bargaining agreement at all is a most blatant violation of the duty to bargain in good faith,' *Hirsch v. Tube Methods, Inc.* 1986 WL 8951, p. 10 (E.D. Pa. 1986) (citing *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 523–524 (1941)); that Re-

spondent's insistence that some stagehands would be covered by the agreement and some would not is an unlawful attempt to change the scope of the bargaining unit; that exclusive hiring hall provisions survive the expiration of a collective-bargaining agreement since they are existing practices which cannot be changed unilaterally, *American Commercial Lines*, 291 NLRB 1066, 1075 (1988), they are a mandatory subject of bargaining, *Southwest Security Equipment Co.*, 736 F.2d 1332 (9th Cir. 1984) cert. denied 407 U.S. 1087 (1985), and the unilateral change of ceasing to use the Union's hiring hall violated Section 8(a)(5) of the Act; and that the Union took the position that it did regarding the Regular Employee because the Union was presented with a fait accompli, and Respondent's unilateral elimination of the position violated Section 8(a)(5), *Robbins Door & Sash Co.*, 260 NLRB 659 (1982).

The Charging Party on brief argues that Respondent appears to want the Board to deem Respondent's contract with the Union to be a Section 8(f) contract even though Respondent offered no proof that the Strand is a construction employer; that cases where the Board outlined the prerequisites for converting 8(f) agreements to 9(a) agreements are inapposite here; that on the expiration of the 10(b) period, Local 298 affirmatively acquired 9(a) status, *Local Lodge 1424 v. NLRB (Bryan Mfg Co.)*, 362 U.S. 411, 422-423 (1960); that a union's major status is established after the running of 10(b) period despite recognition as merely 'exclusive representative' of employees, *Expo Group*, 327 NLRB 413 (1999); that the Strand refused to bargain in good faith with Local 298; that there is no evidence that the parties were at impasse at the point the Strand failed to meet with the Union upon request; that the Strand engaged in unlawful surface bargaining; that the Strand intimidated the Union during negotiations by having Athalon employees shadow Local 298 employees on a one-to-one basis while they worked at the Strand; that the Strand unlawfully acted unilaterally when it ceased hiring from the Union's hiring hall in contravention of the parties contract and did away with the Regular Employer provision of the contract; and that the Strand did not offer any proof that Local 298 lost its majority status and the Board, as set forth in *Levitz*, supra, requires that an employer prove that the union actually has lost the support of a majority before it can withdraw from bargaining.

Respondent on brief contends, as here pertinent, that

In *Staunton Fuel & Material*, . . . , 335 NLRB 717 (2001), the Board held that contractual language in a recognition clause must unequivocally indicate a 9(a) agreement is intended. Despite the fact that *Staunton* deals with an 8(f) construction case, the Board held that the 8(f) cases are equally applicable to the non-construction industry.

Respondent does not provide a citation for its assertion in the last sentence quoted above, it is not in the construction or building industry, and this is not an 8(f) case.<sup>19</sup> It argues that there was never a 9(a) agreement between the Local and the Strand, and without a 9(a) obligation to bargain, the Strand cannot be held in violation of the Act for its alleged failure to bargain.

The Board indicates as follows in *Alpha Assoc.*, 344 NLRB No. 95, slip. op. at 1-3 (2005):

[T]he Board consistently has held that Section 10(b) of the Act precludes an employer from defending against a refusal-to-bargain allegation on the basis that its initial recognition of the union, occurring more than 6 months prior to the filing of unfair labor practice charges raising the issue, was invalid or unlawful. See *Route 22* . . . [Toyota], 337 NLRB 84, 85 (2001); *Morse Shoe [Inc.]*, 227 NLRB 391, 394 (1976), supplemented by 231 NLRB 13 (1977), enf. 591 F. 2d 542 (9th Cir. 1979); *North Bros. Ford [Inc.]*, 220 NLRB 1021, 1021 (1975).<sup>4</sup> Further, whether or not the recognized union had preferred evidence demonstrating its majority status at the time of recognition is irrelevant. The rule concerning non-construction industries is plain. 'If an employer voluntarily recognizes a union based solely on that union's assertion of majority status, without verification, an employer is not free to repudiate the contractual relationship that it has with the union outside the 10(b) period, i.e. beyond the 6 months after initial recognition, on the ground the union did not represent a majority when the employer recognized the union.' *Oklahoma Installation Co.*, 325 NLRB 741, 742 (1998), enf. denied on other grounds, 219 F.3d 1160 (10th Cir. 2000); [footnote omitted] see *Moisi & Son Trucking*, 197 NLRB 198 (1972). Accordingly, as the Respondent's voluntary recognition of the Union in this case occurred more than 6 months prior to the Union's filing of the first unfair labor practice charge alleging the Respondent's refusal to bargain, [footnote omitted] we conclude that Section 10(b) bars the Respondent's challenge to its earlier recognition of the Union based on the absence of proof of the Union's majority status.

*B. Respondent is Estopped from Challenging its Earlier Voluntary Recognition of the Union*

In further agreement with the General Counsel we conclude that the Respondent additionally is estopped from withdrawing recognition from the Union based on either the absence of proof of majority status at the time of recognition or the alleged inappropriateness of the recognized unit. [footnote omitted] The principal of equitable estoppel is premised on the notion that a party that obtains a benefit by engaging in conduct that causes a second party to rely on the 'truth of certain facts' should not be permitted to later controvert those facts to the prejudice of the second party. See *R.P.C., Inc.*, 311 NLRB 232 (1993). The Board has identified the requisite elements of estoppel as (1) knowledge; (2) intent; (3) mistaken belief; and (4) detrimental reliance. See *Red Coats*, 328 NLRB 205, 206 (1999); *R.P.C.*, supra at 233. In addition, in light of the underlying premise of the estoppel doctrine, the Board also assesses whether the party to be estopped has received a benefit as the result of its actions. See *Red Coats*, supra at 207; *R.P.C.*, supra at 233.

The Board previously has applied the doctrine of estoppel to preclude employer unfair labor practice defenses

<sup>19</sup> The numerous 8(f) cases cited by Respondent are not on point. The remaining of Respondent's citations are distinguishable.

similar to those proffered by the Respondent in the instant case. . . . [T]he requisite knowledge and intent in the instant case is demonstrated by the Respondent's voluntary recognition of the Union as the bargaining representative of the production and maintenance employees.<sup>8</sup> Further, the Respondent's conduct of bargaining with the Union for more than a year prior to its repudiation of the bargaining relationship (via its unilateral actions) surely induced the Union to believe that the Respondent would forgo any subsequent challenge to the propriety of the unit or to the Union's majority status as of the time of recognition. See *Red Coats*, supra at 206; *R.P.C.*, supra at 233. Thus, the Union, acting in reliance on its mistaken belief as to the Respondent's intentions, relied to its detriment on the Respondent's actions. Had the Respondent promptly challenged the propriety of the unit or the Union's majority status, the Union would have been in a stronger position to establish its authority through the Board's processes. [footnote omitted See *Red Coats*, supra at 206-207; *R.P.C.*, supra at 233. Finally, as a result of its conduct, the Respondent has obtained the benefit of avoiding potentially costly and time-consuming litigation (or, alternatively, a union organizing campaign), as well as the continued stability of its labor relations. See *Red Coats*, supra at 207. Under these circumstances, '[t]he policies of the Act are not served by allowing the Respondent to use the process of voluntary recognition to gain [a] benefit, only to cast off this process when it does not achieve what it desires in negotiations.' *Id.* Accordingly, we conclude that the Respondent is foreclosed from belatedly contesting the Union's majority status (as of the time of recognition) or the propriety of the recognized unit.

<sup>4</sup> The Board's policy in this regard is premised on the notion that, if the time limitations prescribed by Sec. 10(b) foreclose a direct attack on the validity of an employer's recognition of a union – through the filing of unfair labor practice charges alleging a violation of Sec. 8(a)(2) or 8(b)(1)(A) – an employer should not be permitted to attack that recognition indirectly via a defense to an 8(a)(5) charge after the 6-month period has elapsed. See *Sewell-Allen Big Star*, 294 NLRB 312, 313 (1989) enf'd. 943 F.2d. 52 (6th Cir. 1991) cert. denied 504 U.S. 909 (1992).

....

<sup>8</sup> To demonstrate the 'knowledge' required for purposes of the estoppel doctrine, it need not be established that the Respondent possessed actual knowledge that the Union in fact represented a majority of the unit employees. 'The party to be estopped [need not have] knowledge of all the details or even the bona fides of the event in issue. Rather, to be estopped a party must have had knowledge of an event and have had the opportunity either to accept or refuse to accept the ramifications of that event.' *R.P.C.*, supra at 233 fn. 10.

In the instant case, the Respondent clearly had knowledge of the event, i.e., it was the party that extended recognition. And, it had the opportunity (within 6 months) to accept or refuse to accept the legal consequences of that event.

Respondent violated the Act as alleged in paragraphs 13, 14, 15, 16, and 17 of the complaint when it presented the Union with a fait accompli by unilaterally eliminating the position of Regular Employee, by failing and refusing to use the hiring hall without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct and the effects of this conduct, and by insisting (a) that it would not reach an agreement on a collective bargaining agreement, and (b) on changing the scope of the unit. The Respondent has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit. Respondent unlawfully took the position that after August 15, 2004, it did not have any legal obligations to the Union, that after 20 years of having collective bargaining agreements with Local 298, it no longer had a legal obligation to bargain with the Union. As pointed out by both counsel for General Counsel and the Union, the relationship between the Respondent and the Union has matured into a 9(a) relationship which cannot be dissolved by the Respondent without either a Board election or a showing that the Union no longer represents a majority of the employees covered by the agreement, *Levitz Furniture Co.*, supra. With respect to Respondent's argument that even if a 9(a) agreement exists, the bargaining unit consists of only one permanent employee so the Strand has no bargaining obligation, it is noted that in both cases that Respondent cites, unlike here, it was not shown that there was more than one employee performing unit work at all material times. In the case at hand, the bargaining unit work is done by more than one employee. Respondent did not refute Gaston's testimony that he attempts to have the same people work for the Respondent since they know the building. General Counsel's Exhibit 14 shows how many different employees are utilized by the Respondent. In the circumstances extant here it cannot be concluded by any stretch of the imagination that at all material times the unit work is done by one employee. For the reasons set forth above, and for the reasons given by counsel for General Counsel and the Union on brief as set forth above, the Respondent has violated Section 8(a)(1) and (5) of the Act.

Paragraphs 7 and 9 of the complaint collectively allege Respondent violated Section 8(a)(1) and (3) by on about July 22, 2004, terminating its employee Stephen Palmer by eliminating the position of Regular Employee because he was affiliated with the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

Counsel for General Counsel on brief contends that he has shown that Respondent has knowledge of Palmer's activities on behalf of the Union, it had animus toward the Union, it took action against Palmer, and Respondent has not shown that it would have taken the same action against Palmer despite his union activity, *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); that Respondent was aware that Palmer was the President of Local 298 and it was aware of Palmer's union activities; that Respondent's animus toward the Union is apparent through (a) the comments made by Respondent's witnesses that they could not tolerate having one of their employees serve as union President because he would, as a function of that office, be on the union negotiating committee, and (b) the fact that Respondent as-

sumed that Union President Palmer would damage Respondent's equipment, despite the fact that it had never happened before; that the 1996 or 1997 incidents cited by Mobley are pretexts since Palmer was not disciplined at the time; that the incidents which came to Mobley's attention after Palmer was terminated obviously were not considered in his termination; that the Board applies a three-part test to determine whether otherwise untimely allegations in amended charges are closely related to timely charges, namely (1) whether the otherwise untimely allegation involves that same legal theory as a timely allegation, (2) whether the allegation arises from the same factual circumstances or sequence of events, and (3) whether a respondent would raise similar defenses to both allegations, *Nickles Bakery*, 296 NLRB 927 (1989);<sup>20</sup> that the pertinent allegation in the original timely-filed charge is that Respondent violated Section 8(a)(3) and (5) of the Act by making unilateral changes, including the elimination of Palmer's job; that even if the Section 8(a)(3) allegation contained in the original charge is not deemed a similar legal theory, the 8(a)(3) allegation concerning Palmer's termination involves the same legal theory as the 8(a)(5) allegation concerning the elimination of the position of Regular Employee; that clearly the second part of the test is met because the allegations concern the same factual circumstances, namely Respondent admitted that it terminated Palmer on August 15, 2004, because the position of Regular Employee ended with the expiration of the agreement; and that Respondent would raise similar defenses in that Respondent argues that it did not violate Section 8(a)(5) or Section 8(a)(3) because when the agreement expired on August 15, 2004, the position of Regular Employee ended and Respondent had no legal obligations to the Union or Palmer after August 15, 2004.

The Union contends that Respondent claimed that Palmer was terminated because of a conflict of interest and Palmer's predecessor allegedly sabotaged equipment at a venue in a neighboring city; that Weems conceded that there had never been sabotage at the Strand Theatre prior to the hiring of Athalon; that in 1996 or 1997 when Mobley discussed double billing with Palmer, such conduct stopped; that while Mobley testified at the trial herein that such conduct continued, she did not discover it until just 1 month prior to the hearing herein and Mobley admitted that the double-billing was not a consideration in terminating Palmer; that the second estimate Palmer provided to a client of the Respondent showing increased labor costs reflected what the Union thought it would be obtaining at negotiations, it was an estimate only, it was reasonable to let a prospective client know that labor costs may be increased as a result of labor negotiations, and Mobley admitted that she reviewed such proposals before they go out to clients; that the Strand did not have a valid reason to terminate Palmer; and that the Strand terminated Palmer because he was President of Local 298 and engaged in negotiations.

Respondent on brief argues that Palmer is a statutory supervisor and thus not subject to the Act; that the agreement between Respondent and Local 298 contemplates the Regular Employee to be a supervisor under the Act; that the Regular

Employee responsibly directs employees, assigns tasks, and requires the use of independent judgment; that Palmer testified that he was responsible for staffing requirements and arrival times for stagehands; that the Strand legally eliminated the Regular Employee position; that concerns about Palmer's billing improprieties and sabotage by the Local led the Strand to release Palmer from employment with the Strand; that Palmer overcharged for himself and other stage laborers for the cost of labor; that Palmer charged both the Strand and the renter of the theatre for his services; that even after Mobley confronted Palmer about double dipping, Palmer later resumed this practice; that there was a lack of trust in Palmer and his conviction for making a false oath confirms the Strand's lack of trust in him; and that

the Strand was concerned about Palmer's knowledge and acquiescence in sabotage<sup>9</sup> by *members* of the Local (Tr. 245–246.) [emphasis added.]

<sup>9</sup> Mr. Fogger and also [sic] testified that someone sabotaged a computerized light board system after the August 14, 2004 event, the last event worked by Local workers (Tr. Transcript 66-67). Mr. Palmer did not explicitly deny that this occurred, but rather stated repeatedly that he was unable to 'get any specifics,' or 'get an answer' (Tr. Transcript 183-184). Further, Captain Rogers testified that a Local worker, Greg Pyatt, made physical threats toward Capt. Rogers Athalon [sic] workers who were working as t-shirt security. (Tr. Transcript 271). This testimony is uncontradicted.

This quote appears on page 16 of Respondent's brief. Respondent does not explain how something which allegedly occurred on August 14, 2004, could have been a consideration by Respondent on July 22, 2004, when it terminated Palmer.<sup>21</sup> Respondent also contends that the Union consented to the elimination of the Regular Employee position; that the charge that the termination of Palmer was made because of his membership and activities on behalf of the Union is baseless; that the Strand's financial woes led it to eliminate the Regular Employee position; that even if the termination of Palmer is a violation of the Act (which Respondent denies) the limitations period of 10(b) bars the charge since the first mention of Palmer's termination is found in the Local's amended charge filed on February 25, 2005, which claims he was fired on August 15, 2004, for his union activities; that this is more than 6

<sup>20</sup> Respondent raised a 10(b) issue for the first time during its opening at the outset of the trial herein.

<sup>21</sup> Respondent hired Athalon employees to shadow the union members on a one-on-one basis while they worked in the Strand Theatre. The light board worked during the involved performance. There was no showing that union members were allowed to remain in the theatre after the post production work without their Athalon shadows. So it is unclear how union members would have had an opportunity to unplug cables on the sound board. That being the case, for the Respondent to now assert that Palmer had "knowledge and acquiescence in sabotage [footnote omitted] by members of the Local" amounts to two giant leaps by the Respondent. First, it was not shown that any Local member committed sabotage at the Strand Theatre. Second, it was not shown that Palmer had any knowledge of sabotage at the Strand Theatre. Respondent has not shown means. So the question must be asked, why does the Respondent believe that it is necessary to take it to this extreme.



months from the date of the alleged violation; that none of the allegations in the November 18, 2004 charge referred to Palmer's termination; that the amended charge does not relate back to the date of the original charge because it is not closely related to the original charge in that it did not arise from the same factual circumstances or sequence of events as the pending timely charge, and the defenses to the two charges are distinct; and that the general 8(a)(3) allegation in the original charge does not suffice to closely relate the amendment to the original charge.

Section 10(b) of the Act is not jurisdictional. It is an affirmative defense and, if it is not timely raised, it is waived. *Public Service Co.*, 312 NLRB 459, 461 (1993), and *DTR Industries*, 311 NLRB 833, 833 fn. 1 (1993), enf. denied 39 F.3d 106 (6th Cir. 1994) (waived when not pleaded as an affirmative defense in the answer or litigated at the trial, even though raised in the post-trial brief). The Strand did not raise Section 10(b) as an affirmative defense in its answer to the complaint. However, it did, as noted above, raise this defense in its opening statement at the outset of the trial herein and it reiterated the defense in its motion to dismiss, made after General Counsel's case-in-chief. As pointed out by the Board in *Air Contract Transport, Inc.*, 340 NLRB 688, 690 (2003)

The merits of the Respondent's 10(b) defense turn on whether the otherwise untimely amended complaint allegation is closely related to the timely filed unfair labor practice charge. In deciding whether complaint amendments are closely related to charge allegations, the Board applies the 'closely related' test, comprised of the following factors: (1) whether the untimely allegation involves the same legal theory as the allegation in the timely charge; (2) whether the allegations arise from the same factual situation or sequence of events; and (3) whether the respondent would raise similar defenses to both allegations. *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988).

Clearly General Counsel has satisfied factor (2) of the test set forth above in that all of that which is covered by the involved complaint, including Palmer's termination, flows from Respondent's failure and refusal to meet its obligation to bargain with the Union over a new collective bargaining agreement after the last one expired on August 15, 2004. Respondent made the decision to get rid of the Union and the termination of Palmer with the ending of the Regular Employee position was part of that decision. The fact that the Union, after it was presented with a fait accompli, did not challenge the Respondent on this point carries no weight. Both the original charge and the amended charge refer to the same Sections of the Act. Both charges refer to Respondent's refusal to bargain in good faith, Respondent unlawfully taking unilateral action without bargaining to impasse, and Respondent unlawfully terminating the contractual crew arrangement and refusing to hire Local 298 members. The Respondent was informed of the nature of the violations charged against it and it was placed on notice with respect to what evidence it should preserve relating to this matter. To take a stand on the fact that the amended charge may be more specific than the original charge elevates form over substance. The amended complaint allegations involve the same

legal theory as the timely filed charge. Respondent ended the Regular Employee position because it took the position that had no obligation to bargain with the Union. Respondent ended the Regular Employee position because it wanted to withdraw recognition of the Union. And Respondent raised the same defense utilizing the same witnesses to defend against the allegations in the original and the amended charges. In my opinion the involved amended complaint allegations are closely related to the original charge and, therefore, General Counsel has also satisfied factors (1) and (3).

With respect to whether Palmer was a supervisor under the Act, the burden of proof is on the party claiming supervisory status. Respondent did not assert that Palmer was a supervisor in its answer to the complaint, it did not include this assertion in its opening statement made at the outset of the trial herein, and it did not include this assertion in its motion to dismiss made at the conclusion of General Counsel's case-in-chief.<sup>22</sup> Respondent does, however, raise this issue on brief, arguing that its agreement with the Union clearly contemplates the Regular Employee to be a supervisor under the Act; that the Regular Employee responsibly directs employees, and requires the use of independent judgment; that Palmer testified that he pretty much makes sure that everybody follows the rules; that Palmer testified that since the Regular Employee position was eliminated, "somebody would still have to do the supervision of employees (Tr. 162);" and that this indicates that Palmer's duty as the Regular Employee was to supervise employees. Section 2(11) of the Act reads as follows:

The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

With respect to Respondent's assertion that Palmer's above-quoted testimony indicates that his duties as a regular employee was to supervise employees, perhaps the context of the full statement made by Palmer, who was not shown to be an attorney well-versed in the intricacies of labor law, should be considered. Counsel for General Counsel was asking Palmer about Respondent's Exhibit 15, which is the Union proposal which Palmer drafted and went over with the Respondent at the August 18, 2004 negotiation session. Part of the Union's proposal reads, as here pertinent, as follows:

Local shall designate one (1) employee as a Job Steward who shall supervise the employees and assure the proper and efficient performance of their duties. The Job Stewards rate of pay shall be that of a Department Head plus twenty percent (20%); he or she will be responsible for all job-related dealings with the STRAND. On calls of five (5) employees or

<sup>22</sup> Indeed, in its opening statement Respondent argued that "this is a one employee bargaining unit, that employee being the regular employee." (Tr. p. 18.)

less, the Job Steward will be a Department Head. On calls of Six (6) or more, the Job Steward will be strictly a supervisory position.

Counsel for General Counsel asked Palmer what he explained to the Respondent on August 18, 2004, about the Union's proposal and, as here pertinent, Palmer testified at transcript page 162 as follows:

Yes. I'm sure we talked about that, since my job was going to be eliminated as regular employee, we needed to change the way a job steward classification was within the contract. Somebody would still have to be a timekeeper. Somebody would still have to do the supervision of employees. So we gave them a clause that was pretty much identical to our minimum rates and standard card, to where an employee is a job steward to supervise all employees and be paid 20 percent more than a department head.

Obviously Palmer's testimony regarding the above-described proposed contract language and the reason for the proposed language did not confer supervisory status on Palmer within the meaning of Section 2(11) of the Act. Also, the Regular Employee language in the collective-bargaining agreement is cited by Respondent in support of its argument that Palmer was a supervisor. Without knowing exactly what authority Palmer exercised, the cold printed words in the last collective-bargaining agreement do not have a life of their own. Respondent did not elicit testimony in an attempt to bring the cold printed words to life. Since Respondent did not make this an issue before or during the trial herein, Respondent denied opposing counsel the opportunity to refute the position Respondent now takes. Respondent did not show exactly what authority Palmer exercised which would make him a supervisor. As noted above, the burden of proof is on the one claiming supervisory status. *Chevron, U.S.A.*, 309 NLRB 59, 62 (1992), enfd. mem. 28 F. 3d 107 (9th Cir. 1994). Respondent has not met that burden.

As set forth in *Fluor Daniel, Inc.*, 304 NLRB 970, at 970 (1991),

In *Wright Line*, 251 NLRB 1083 (1980) enfd. 662 F.2d 899 (1st Cir. 1981) cert. denied 455 U.S. 989 (1982),<sup>4</sup> the Board set forth its causation test for cases alleging violations of the Act turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once accomplished, the burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal.<sup>5</sup> The motive may be inferred from the total circumstances proved. Under certain circumstances the Board will infer animus in

the absence of direct evidence.<sup>6</sup> The finding may be inferred from the record as a whole.<sup>7</sup>

<sup>4</sup> Approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

<sup>5</sup> *Shattuck Denn Mining Corp. v. NLRB*, 362 F. 2d 466, 470 (9th Cir. 1966).

<sup>6</sup> *Association Hospital Del Maestro*, 291 NLRB 198, 204 (1988); *White-Evans Service Co.*, 285 NLRB 81, 82 (1987).

<sup>7</sup> *ACTIV Industries*, 277 NLRB 356, 374 (1985); *Heath International*, 196 NLRB 318, 319 (1972).

In order to establish a prima facie violation of Section 8(a)(1) and (3) of the Act, General Counsel must establish union activity, employer knowledge, animus and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence. Evidence of false reasons given in defense may support such inferences.

Here Palmer had engaged in union activity. He was president of Local 298. He had negotiated for the Union with Respondent in the past. Respondent was well aware of Palmer's union activity. Respondent took action against Palmer because of his union activities. Antiunion animus is demonstrated by Respondent's unlawful withdrawal of recognition from the Union, Respondent's unlawful unilateral modifications, Respondent's refusal to bargain in good faith with the Union, Respondent's unlawful termination of its referral arrangement with the Union, and Respondent's unlawful refusal to hire Local 298 members. Weems testified that he really objected "to have the representative of the union [Palmer] there trying to—who was also drawing a paycheck from The Strand Theatre, to negotiate . . . [contractual] terms and conditions. . . ." (Tr. p. 252.) There is no legal reason which would preclude an employee from being on a negotiating committee. And there is no legal prohibition against an employee being an officer of a union. Weem's visceral reaction to the situation could be itself considered anti-union animus.

The burden of going forward has shifted to Respondent to demonstrate that Palmer would have been terminated notwithstanding his protected conduct. As noted above, it is well settled that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal. Here, Respondent's alleged justifications for Palmer's termination do not withstand scrutiny. Palmer worked for the Strand for 20 years. Respondent did not show that during that 20-year period Palmer ever committed an act of sabotage against the Strand or anyone else. To terminate someone arguing that he was terminated because he might commit an act of sabotage in the future is ridiculous. The argument is all the more ridiculous when one considers that Respondent itself intended to engage in unlawful conduct and in anticipation of its own unlawful conduct Respondent was worried that Palmer might retaliate against the Strand Theatre because of its unlawful conduct. In other words, if Respondent had acted lawfully, what would have been the motivation for retaliation? Respon-

dent itself created the unlawful situation and it wanted to make sure in advance that Palmer would not have the opportunity to react inappropriately to Respondent's unlawful conduct. This alleged justification holds no water.

Respondent's argument that its financial woes led it to eliminate the Regular Employee position must be viewed in terms of the fact that shortly after it unlawfully, unilaterally eliminated the Regular Employee position Respondent hired a production supervisor, Byrd, basically to do Palmer's job.<sup>23</sup> Respondent paid Byrd an annual salary of \$38,500. Byrd was kept on by Respondent up to 7 days before the trial herein. While Respondent may have been operating at a deficit, that was not the reason the Regular Employee position was eliminated. It is one thing to do away with a position because it can no longer be afforded. It is something else to replace one employee with another employee who costs less. The Union was presented with a fait accompli regarding the elimination of the Regular Employee position. The fact that the Union's subsequent proposals acknowledged this fact should not weigh in Respondent's favor.

On the one hand, Fogger, in answering a question of Respondent's attorney, testified that while Palmer could have been kept on as an employee after the extension of the contract expired on August 15, 2004, the Strand chose not to because of "[c]ost. . . . The position that Mr. Palmer had, as I said, was approximately a \$49,000 to \$52,000 position. We just simply couldn't afford it." (tr. p. 68) Fogger did not assert that Palmer would not have been kept on after August 15, 2004, because of billing improprieties. On the other hand, Mobley specifically cites what she deemed to be an inappropriate billing practice which occurred in 1996 or 1997, an estimate where Palmer included the raise he believed the Union would get in negotiations, and labor reports she did not see until 8 months after Palmer was terminated. Obviously Palmer worked for Respondent for about 8 years after the 1996 or 1997 labor reports. The estimate of what the Union would charge in September 2004 was not shown to be anything other an estimate. And, what Mobley saw in March 2005, 8 months after Palmer was terminated obviously could not have been considered in terminating him in July 2004. I do not find Mobley to be a credible witness regarding her justifications for Palmer's termination. Palmer was terminated because of his union activities, Respondent's unlawful conduct, and Respondent's antiunion animus. Respondent had decided that it was going to unlawfully withdraw its recognition of the Union and terminating Palmer was, among other things, the symbolic severing of one of the vestiges of this longstanding relationship between Respondent and the Union. Respondent has not shown that it would have terminated Palmer absent his union activities. Respondent violated the Act as alleged in the complaint in terminating Palmer.

<sup>23</sup> Fogger described Byrd as a "supervisor." It was not shown by Respondent that Byrd was a Sec. 2(11) supervisor. Consequently, any argument that Palmer was a supervisor under the Act because, according to Fogger, his replacement, Byrd, was a "supervisor," would carry no weight. Respondent did not show that Palmer actually exercises supervisory authority under the Act.

Paragraphs 8 and 9 of the complaint collectively allege that Respondent violated Section 8(a)(1) and (3) of the Act in that since about August 15, 2004, and continuing to date, Respondent has failed and refused to hire employees affiliated with the Union's hiring hall because the employees were affiliated with the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Counsel for General Counsel contends on brief that the same of animus that supports the conclusion that Respondent terminated Palmer because of his union activity supports the conclusion that Respondent ceased using the Union's hiring hall because it did not want to hire Union members; that Respondent admitted that since August 15, 2004, it has hired Athalon employees to do the work formerly done by employees hired through the Union's hiring hall; that Respondent gave no explanation for its behavior that would refute the conclusion that its animus toward the Union motivated its decision to stop using the Union's hiring hall; and that, therefore, Respondent's failure to use the Hiring hall violates Section 8(a)(3) of the Act. Respondent's antiunion animus is described above. As pointed out by counsel for General Counsel, Respondent did not give an explanation for its behavior that would refute the conclusion that its animus toward the Union motivated its decision to stop using the Union's hiring hall. Respondent violated the Act as alleged in paragraphs 8 and 9 of the complaint.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All employees performing work described in Paragraph 2.1 of the collective agreement between the Respondent and the Union, effective from December 15, 1999 to December 14, 2002, and by mutual consent, extended to August 15, 2004.

4. Since 1984, and at all times thereafter, the Charging Party has been the exclusive collective-bargaining representative of the unit described in paragraph 3 above, based on 9(a) of the Act.

5. By engaging in the following conduct, Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (5) of the Act.

(a) About August 15, 2004, Respondent eliminated the position of Regular Employee without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct.

(b) Since about August 15, 2004, Respondent has failed and refused to use the Union's hiring hall in hiring its employees without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct.

(c) Since about September 22, 2004, Respondent insisted that it would not reach an agreement on a collective-bargaining

agreement, insisted on changing the scope of the unit, and by other conduct has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit.

6. By engaging in the following conduct, Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (3) of the Act.

(a) About July 22, 2004, Respondent terminated its employee, Stephen Palmer, by eliminating the position of Regular Employee.

(b) Since about August 15, 2004, and continuing to date, Respondent has failed and refused to hire employees affiliated with the Union's hiring hall.

7. The unfair labor practices described above affected commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist therefrom, and take certain affirmative action necessary to effectuate the policies of the Act.

Having found that Respondent unlawfully made unilateral changes in violation of Section 8(a)(1) and (5) of the Act, I recommend that Respondent restore the terms and conditions of employment which were in effect, and applicable to employees in the bargaining unit, including the use of Charging Party's employment referral service in the manner agreed on in the parties' 1999–2004 (as extended) collective-bargaining agreement, before Respondent unilaterally changed those terms and conditions on August 15, 2004, and make whole all unit employees for losses suffered as a result of the changes, as calculated in accordance with *Ogle Protection Service*, 183 NLRB 682, 683 (1970), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent having discriminatorily discharged Stephen Palmer, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in the manner prescribed in *New Horizons for the Retarded*, supra.

The Respondent will be required to expunge from its records any reference to the unlawful discharge of Stephen Palmer.

Having found that Respondent unlawfully withdrew recognition from the Union, It shall be recommended that Respondent recognize and bargain collectively with the Union upon request, and embody any understanding reached into a signed agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:<sup>24</sup>

<sup>24</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

#### ORDER

The Respondent, The Strand Theatre of Shreveport Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the unit found appropriate here by unilaterally ceasing the application of the terms and conditions set out in the 1999–2004 (as extended) collective-bargaining agreement

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As pointed out by the Board in *Alpha Associates*, supra, at slip op. 6, for the reasons set forth in *Caterair International*, 322 NLRB 64, (1996) an affirmative bargaining order is warranted as a remedy for the Respondent's unlawful withdrawal of recognition from the Union. An affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Id.* at 68.

However, in *Vincent Industrial Plastics v. NLRB*, 209 F. 3d 727, 738 (D.C. Cir. 2000) the court held that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act."

I find that a balancing of the three factors warrants an affirmative bargaining order. (1) An affirmative bargaining order in this case vindicates the Sec. 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's withdrawal of recognition and its refusal to bargain with the Union. An affirmative bargaining order does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because its duration is only temporary.

Respondent engaged in unlawful conduct which undermined the Union's opportunity to bargain effectively. Since the Union was never given a truly fair opportunity to reach an accord with Respondent, it is only by restoring the status quo ante and requiring Respondent to bargain with the Union for a reasonable period of time that the employees will be able to fairly assess for themselves the Union's effectiveness as a bargaining representative.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union. It also ensures that the Union will not be pressured by the Respondent's withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent's refusal to bargain with the Union because it would permit a decertification petition to be filed before the Respondent has afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement. Such a result would be particularly unfair in circumstances such as those here, where the Respondent's other unfair labor practices were serious unilateral actions that were likely to have a continuing effect, thereby tainting employee disaffection from the Union arising during that period or immediately thereafter. These circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who might oppose continued union representation.

An affirmative bargaining order, with its temporary decertification bar for a reasonable period of time, is necessary to fully remedy the Respondent's unlawful refusal to bargain with the Union in this case.

to unit employees, by unilaterally modifying such terms and conditions, and by unilaterally ceasing its utilization of the union hiring hall referral services as required in the collective-bargaining agreement.

(b) Discharging Stephen Palmer because of his union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore the terms and conditions of employment which were in effect, and applicable to employees in the bargaining unit, including the use of the Charging Party's employment referral service in the manner agreed on in the parties 1999–2004 (as extended) collective-bargaining agreement, before the Respondent unilaterally changed those terms and conditions of employment on August 15, 2004, and make whole all unit employees for losses suffered as a result of the changes, as calculated in accordance with *Ogle Protection Service*, 183 NLRB 682, 683 (1970), with interest computed in the manner prescribed in *Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Recognize and on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of unit employees with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Within 14 days from the date of this Order, offer Stephen Palmer full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(d) Make Stephen Palmer whole for any loss of earnings and other benefits he suffered as a result of the Respondent's unlawful termination in the manner set forth in the remedy section of this decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Stephen Palmer in writing that it has done so and that it will not use the discharge against him in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Shreveport, Louisiana facility copies of the attached notice marked "Appendix"<sup>25</sup> Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by

the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps should be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 22, 2004.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 3, 2005

#### APPENDIX NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representation to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain with the Stage Employees Local 298 of The International Alliance of Theatrical Stage Employees And Moving Picture Machine Technicians, Artists, and Allied Crafts of the United States and Canada, AFL–CIO as the exclusive representative of our employees in the following unit:

All employees performing work described in Paragraph 2.1 of the collective agreement between the Respondent and the Union, effective from December 15, 1999 to December 14, 2002, and by mutual consent, extended to August 15, 2004.

WE WILL NOT fail to bargain with the Stage Employees Local 298 of The International Alliance of Theatrical Stage Employees and Moving Picture Machine Technicians, Artists, And Allied Crafts of the United States and Canada, AFL–CIO as the exclusive representative of our employees in the above-described unit by unilaterally ceasing the application of the terms and conditions set out in the 1999 to 2004 (as extended) collective-bargaining agreement to unit employees, by unilaterally modifying the agreement, and by unilaterally ceasing our utilization of the union hiring hall referral services as required in the collective-bargaining agreement.

<sup>25</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT discharge or otherwise discriminate against you for supporting Stage Employees Local 298 of The International Alliance of Theatrical Stage Employees and Moving Picture Machine Technicians, Artists, and Allied Crafts of the United States And Canada, AF—CIO or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with Stage Employees Local 298 of The International Alliance of Theatrical Stage Employees and Moving Picture Machine Technicians, Artists, and Allied Crafts of The United States And Canada, AFL—CIO, and put in writing and sign any agreement reached on terms and conditions of employment for you.

WE WILL rescind all of the changes we made, on or after August 15, 2004 in the terms and conditions of employment of bargaining unit employees, and restore the terms and conditions of employment as described in our 1999–2004 (as extended) collective-bargaining agreement with the Union, and WE WILL make whole, with interest, all unit employees for losses suffered as a result of the changes.

WE WILL make whole, with interest, all employees who would have been referred to us for employment, through the Union's referral service, and employed by us, but were not employed by us because, on and after August 15, 2004, we did not use the Union's referral service as provided in our 1999 - 2004 (as extended) collective bargaining agreement with the Union.

WE WILL within 14 days from the date of the Board's Order, offer Stephen Palmer full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make Stephen Palmer whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Stephen Palmer, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

THE STRAND THEATRE OF SHREVEPORT CORPORATION